

INTERNATIONAL LAW AND THE USE OF FORCE AMONG NATIONS



Lieutenant Colonel Mary V. Perry, USAF
Deputy Legal Counsel to the
Chairman of the Joint Chiefs of Staff

WAR AND THE LAW: PRINCIPLES AND SOURCES

- Must distinguish between resort to armed conflict, and use of force in conflict
- Law of Armed Conflict seeks to prevent unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through minimum standards for protection

PRINCIPLES AND SOURCES (continued)

- Dishonorable (treacherous) means and dishonorable conduct are forbidden
- Law of armed conflict not intended to impede the waging of hostilities
- Purpose of the law is to ensure that the violence of hostilities is directed toward the enemy's forces, and not used to cause purposeless, unnecessary human misery and physical destruction

LAW SUPPORTS PRINCIPLES OF WARFARE

- Law compliments and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security
- Law of Armed Conflict and principles of warfare underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant

LAW SUPPORTS PRINCIPLES OF

WARFARE (continued)

- These principles do not prohibit the application of overwhelming force against enemy combatants, units, and material (Powell Doctrine)

USE OF FORCE: HISTORY

- Traditional View: Nations are free to use force against one another
- Implications
 - Might makes right
 - International relations base on military power, alliances, and balance of power calculations
 - Produced regular and increasingly destructive international armed conflict

EARLY DIPLOMATIC INITIATIVES AT REGULATION

- Hague Conventions of 1899 and 1907
 - Regulations annexed to Hague Convention IV of 1899 most important
 - Regulated “means” and “methods” of warfare
- Geneva POW Convention of 1929
- Impact limited because of absence of community sanctioning body

POLITICAL FALSE STARTS AT REFORM

- League of Nations
 - Collective Security
 - Peaceful settlement of disputes
- Kellogg-Briand Pact of 1928
 - Parties renounce war as an instrument of national policy
 - 63 parties, including Japan, Germany, Poland, Czechoslovakia, France, USSR, UK, and US

POST-WORLD WAR II DEVELOPMENTS

- Nuremberg and Tokyo War Crimes Tribunals: Individual criminal responsibility adjudged for waging aggressive wars
- UN Charter: Article 2(4) No threat or use of force against the territorial integrity or political independence of any manner inconsistent with the purposes of the United Nations

UN CHARTER: DISPUTE RESOLUTION

- Article 33: Obligation to negotiate, etc.
- Article 36: Referral to the International Court of Justice
- Article 11: General Assembly may discuss and make recommendations
- Article 99: Secretary General may act on behalf of Security Council
- Chapters IV and VII: Security Council may order sanctions and authorize the use of force by members, or a UN force

UN CHARTER / CHAPTER VIII REGIONAL ARRANGEMENTS

- Regional arrangements can deal with threats to peace in their regions
- Security Council may employ regional arrangements for enforcement action (e.g., NATO in Bakans)
- No enforcement action shall be taken by regional arrangements without the authorization of the Security Council

UN CHARTER (continued)

- Regional arrangements may initiate collective self-defense actions pursuant to their own charter provisions without Security Council authorization
- Article 51: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

IMPLICATIONS OF SELF-DEFENSE

- Subject to customary international law principles of necessity and proportionality
- Recognizes a pre-existing doctrine of self-defense that may be broader than the language of Article 51. (Article 51 recognizes the “inherent” right of self-defense)
 - Defense against violations of legal rights not amounting to an armed attack (e.g. refugees)
 - Right of anticipatory self-defense—use of force in response to demonstration of hostile intent (Caroline incident-1837)

SELF-DEFENSE

(continued)

- Self-defense in neutral territory
 - U.S. bombing of N. Vietnam forces in Cambodia
 - Turkish raids on Kurdish fighters in Iraq
 - Israeli attacks on Palestinian guerrillas in Lebanon
 - U.S. cruise missile attacks on terrorist camps in Afghanistan and chemical weapons factory in Sudan

SELF-DEFENSE ISSUES OFTEN DISPUTED WITH COALITION PARTNERS

- Arises most often in peacekeeping or peace enforcement scenarios
- Use of deadly force to protect property may be justified only if classified, dangerous, or mission-essential
- Requirement to shoot to wound
- Requirement for warning shots or other inquiry

SELF-DEFENSE ISSUES OFTEN DISPUTED WITH COALITION PARTNERS (continued)

- Extent of hot pursuit to be permitted
- Response to aerial intruders, border incursions, “attack profiles”, radar lock, etc.
- Points up need for clear ROE understood and accepted by all coalition partners

REPRISALS

- Historically, reprisals have been applied in both war and peace
- Elements
 - Violation of a nation's legal rights
 - Demand to stop the violation
 - Act of reprisal; otherwise unlawful
 - Motive must be persuasion to stop the violation
 - Principles of necessity and proportionality apply, but differently from self-defense in that the authorized response is that which is required to stop the violation

BELLIGERENT REPRISALS

- Triggered by violations of the law of war
- Serious abuses in WW II (e.g., killing civilians in occupied territory)
- 1949 Geneva Conventions: No reprisals against PWs, wounded and sick, shipwrecked, medical personnel, civilians in occupied territory

BELLIGERENT REPRISALS (continued)

- As extremely limited, still alive and well. (e.g., indiscriminate weapon of mass destruction might be used to stop a biological or chemical weapons attack on the U.S. if required for nation's survival)
- More effective to cast in terms of the right of self-defense

PEACETIME REPRISALS: A USEFUL DOCTRINE

- Declaration on Friendly Relations (1970)
 - The threat or use of force constitutes a violation of international law and shall never be used as a means of settling international issues
 - States have a duty to refrain from acts of reprisal involving the use of force
 - Use of force in circumstances previously considered in terms of peacetime reprisal and now described as responses in self-defense

HUMANITARIAN INTERVENTION: POSSIBLE CRITERIA

- Genocide
- Ethnic cleansing
- Widespread, systematic policy of human rights violations
- Collapse of effective government
- Must determine if military intervention is feasible
- Most defensible if can combine with other legal bases for use of force

RATIONALE(S) FOR INTERVENTION

- U.S. Invasion of Genada
- U.S. Invasion of Panama
- Persian Gulf War
- Operation Northern Watch
- Operations Southern Watch
- Somalia (1992-1993)
- Somalia (1993-1994)
- Bosnia (UN phase)
- Bosnia (NATO phase)
- Kosovo

OUR NEWEST DEFENSE CHALLENGE

- Defense of critical infrastructure
- EO 13010 (1996) defined critical national infrastructure as “so vital that their incapacity or destruction * * * would have a debilitating impact on the defense or economic security of the United States”
- 8 critical national infrastructures are identified in the EO: continuity of government; telecommunications; transportation; electric power systems; banking and finance; water supply systems; gas and oil storage and transportation; and emergency services (medial, police, fire, and rescue)

OUR NEWEST DEFENSE CHALLENGE (continued)

- Each of these infrastructures is computer driven
- PDD 62 (1998) and PDD 63 (1998) equate attacks on critical national infrastructure with aggression against the United States
- Use of force may be authorized under such circumstances if vital national security interests are impacted



Questions?